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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.

THE HUDSON COAL COMPANY,

Petitioner,

against

ARJA WATKINS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Hudson Coal Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Circuit Court of Appeals for the Third Circuit, filed on September 5, 1945, which, by a divided court, modified an order of the United States District Court for the Middle District of Pennsylvania staying this action pending arbitration and affirming the order as modified.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by § 240 (a) of the Judicial Code, 28 U. S. C. § 347 (a) as amended by the Act of February 13, 1925.

The opinion and order of the Circuit Court for the Third Circuit (R. 80-100) were filed September 5, 1945. Petitioner's application for rehearing was denied October 2, 1945 (R. 106).

Opinions Below

The opinion of the District Court is reported in 54 F. Supp. 953, and is also printed in the record (R. 63-72).

The majority opinion of the Circuit Court of Appeals and the opinion of Judge McAllister, dissenting in part, are reported in 151 F. 2d 311 and are also printed in the record (R. 80-100).

Questions Presented

The questions presented by this petition are:

1. Whether substantial rights of petitioner were not infringed by the action of the Circuit Court in finally determining certain issues of fact and law subordinate to the main issue found to be arbitrable, prior to any hearing on the merits before the arbitrators or before the District Court and a jury.

2. Whether a Federal Court having jurisdiction to grant, and granting, a stay of an action pending arbitration of the issue involved pursuant to Section 3 of the United States Arbitration Act (herein called the "Arbitration Act"), but having no jurisdiction affirmatively to order such arbitration pursuant to Section 4 of that Act, may finally determine issues of fact and law upon which the main issue found to be arbitrable is dependent.

3. Whether an employer may settle, *in whole or in part*, a back liability under the Fair Labor Standards Act of 1938 (herein called the Act) by the payment, for a speci-

fied period, of a greater sum as wages than the employer would have paid but for such settlement.

Statutes Involved

Pertinent provisions of the United States Arbitration Act (43 Stat. 883, 9 U. S. C., § 1, *et seq.*) and of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., § 201, *et seq.*) are set forth in the Appendix.

Statement

Petitioner is the owner and operator of anthracite coal mines in Lackawanna and Luzerne Counties, Pennsylvania. Respondents are certain of its employees in maintenance jobs known within the Industry as "occupations continuously manned".

Respondents, thirty-eight in number, brought suit for overtime and liquidated damages under the Fair Labor Standards Act of 1938. Their stated claims, including attorneys' fees, approximate $98,000. Petitioner answered, denying most of the allegations of the complaint, and alleging among other things that respondents' employment was under the terms of collective bargaining contracts made between the United Mine Workers of America, as respondents' representatives, and the Anthracite Operators, fixing wage rates and conditions of employment for the entire Anthracite Industry. As a separate and distinct defense petitioner pleaded an agreement for arbitration of all difficulties and disagreements arising out of the relation of the employers and employed, contained in such collective bargaining contracts.

The agreement for arbitration is Article IV of the Award of the Anthracite Coal Strike Commission of 1903, which has been continued in force by collective bargaining

as a part of each succeeding wage agreement.* The full text of the arbitration agreement is quoted in the Circuit Court's opinion (R. 95-96). The material part reads as follows:

> "That any difficulty or disagreement arising under this award, either as to its interpretation or application, or in any way growing out of the relations of the employers and employed, which cannot be settled or adjusted by consultation between the superintendent or manager of the mine or mines, and the miner or miners directly interested, or is of a scope too large to be so settled or adjusted, shall be referred to a permanent joint committee, to be called a Board of Conciliation, to consist of six persons, appointed as hereinafter provided. * * *
>
> "The Board of Conciliation thus constituted, shall take up and consider any question referred to it as aforesaid, hearing both parties to the controversy, and such evidence as may be laid before it by either party; and any award made by a majority of such Board of Conciliation shall be final and binding on all parties."

The separate and distinct defense of petitioner's answer was brought before the District Court upon peti-

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* The anthracite grievance procedure culminating, where necessary, in arbitration, before the Board of Conciliation is "possibly the oldest, continuous grievance adjustment set-up in the United States and Canada * * * and has been copied in many industries of the country since 1937". Between 1903 and 1941, printed reports of the Board disclose, there were 5104 cases filed with the Board, not including many more grievances settled at early stages of the procedure. 44% of all cases filed have been settled without necessity of a ruling by the Board or Umpire. Approximately 60% of the 5104 filed grievances "could be classified as 'money grievances', that is, disputes over rates and payments".

The foregoing quotations and statistics are taken from a report prepared by Dr. Thomas E. Larkin, Umpire of the Anthracite Board of Conciliation for delivery at the Fifth Annual Anthracite Conference at Lehigh University, originally scheduled for May 3 and 4, 1945, but postponed because of war conditions. The report was intended for publication with other papers prepared for the conference.

tioner's application for preliminary hearing and for stay of suit until arbitration has been had (R. 45-48). Respondents answered this application alleging that the collective bargaining agreements are illegal and void (R. 48-51).

For the purpose of such preliminary hearing and motion the parties agreed upon the following material facts (R. 52-53):

> "(1) The several contracts pleaded in Defendant's Answer were made as therein alleged and the copies thereof attached to said Answer as exhibits are true and correct copies of the original contracts.
>
> (2) The defendant, The Hudson Coal Company, is a party to these contracts.
>
> (3) Plaintiffs were members of District No. 1 of the United Mine Workers of America at all times involved in these proceedings.
>
> (4) Plaintiffs were at all times employed in 'occupations continuously manned' within the meaning of that phrase as used in the last paragraph of section (3) of the Agreement of May 7, 1936 (Answer—Exhibit M—p. 150).
>
> (5) Plaintiffs were employed at all times in occupations in and about defendant's mines necessary to the mining and preparation of anthracite coal for market in the capacities stated in the Complaint and Answer, and none of the power, electric or otherwise, produced in any plant in which any of them worked was used in transportation other than in hauling the unprepared coal out of the mines to the breaker where it was prepared for market."

The wage agreement in force on October 24, 1938, the effective date of the Fair Labor Standards Act, was the Agreement of May 7, 1936 (R. 37-39), which had been extended to April 30, 1939 by Agreement of November 13, 1937 (R. 40). By the Agreement of May 26, 1939 (R. 40-41) the wage rates of the 1936 Agreement were further ex-

tended to April 30, 1941, for all except certain employees, in respect to whom it was provided as follows (R. 41):

> "(6) The case of employees exempt from the maximum hour provisions of Section (3) of the Agreement of May 7, 1936, as covered by subsequent interpretation of the Board of Conciliation, whose rates received the seven-hour wage adjustment under the said agreement, and who are affected by the Federal maximum hour and minimum wage legislation, shall be referred to the Board of Conciliation. The Board of Conciliation, exclusive of the umpire, is authorized and instructed to make a comprehensive study of the problem and work out an arrangement within ninety days of date of this agreement covering such employees on the basis that the weekly earnings of such employees shall be equal under this agreement to the earnings of such employees under the rates now in effect, as provided under the Agreement of May 7, 1936, for equal time worked."

Pursuant to this authority the Board of Conciliation on September 5, 1939, adopted a resolution which after various recitals provided for these employees as follows (R. 44-45):

> "(1) In compliance with the basic hour and rate provision of the Fair Labor Standards Act of 1938, which provides for a maximum of forty hours per week in October, 1940, plus punitive rates for time in excess thereof, it is agreed that the forty hours per week shall be the basis for a formula, which will produce earnings that shall be the same as former earnings of such employees for equal time worked;"

Petitioner avers that effective November 1, 1939, hourly rates were adopted by it under the above resolution and thereafter paid for the duration of the 1939 Agreement for the maximum hours per week and one and one-half those rates for overtime hours (R. 18).

These same employees were again the subject of special provisions in section (7) of the Wage Agreement of May 20, 1941 (R. 42-44):

"(7) The hourly rates of employees, exempted from the provisions of the seven-hour day under the Agreement of May 7, 1936, who have not been adjusted to a forty-hour basis and who regularly worked a fixed number of hours of forty-two hours per week or more,* shall be established for the period May 1, 1941, to September 30, 1941, by adding 7½% to their weekly earnings as calculated under the provisions of said agreement and dividing the sum by the hours regularly employed weekly plus one-half the hours worked in excess of forty hours; and for the period October 1, 1941, to April 30, 1943, by adding 10% to their weekly earnings as calculated under the provisions of said agreement and dividing the sum by the hours regularly employed weekly plus one-half the hours worked in excess of forty hours.

* * * * * * * *

"The wage adjustments provided herein for employees customarily working forty-two hours a week, or more, constitute full settlement and satisfaction of all their claims, if any, for overtime against any signatory operator arising out of employment prior to May 1, 1941."

Petitioner does not claim that time and one-half was paid currently to respondents for overtime hours prior to November 1, 1939, but that overtime for the period was later paid under the last above quoted provision of the Agreement of 1941. For this period prior to November 1, 1939 there is also a disagreement between respondents and petitioner as to the hours of overtime and in some instances as to the applicable hourly rates. Subsequent to November 1, 1939, petitioner avers that it currently paid all overtime on the basis of time and one-half the

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* It is averred in paragraph XXII of the answer (R. 18-19) that "plaintiffs and each of them, are, and at all times mentioned in the complaint were, employees of the defendant, exempted from the provisions of the seven-hour day under the contract of May 7, 1936 (Exhibit M hereto), who had not been adjusted to a forty hour basis and who regularly worked a fixed number of hours of forty-two hours per week or more."

regular hourly rates provided by the Wage Agreements of 1939 and 1941. The same disagreements as to the hours of overtime and hourly rates exist for the periods subsequent to November 1, 1939, as prior thereto (R. 3-12, 21-30).*

The foregoing quotations from the contracts of 1939 and 1941 and from the resolution of the Board of Conciliation dated September 5, 1939 are the portions of the pertinent wage agreements which respondents claim are in violation of the Fair Labor Standards Act and which they contend render the entire contracts, including the provision for arbitration, illegal and void.

The District Court held that the hourly rate formulas prescribed under these agreements and resolution are valid and ruled that the provision of the Agreement of May 20, 1941, settling any back claims for overtime, whether legal or illegal, is severable from the balance of the contract. The court thereupon ordered (R. 72) that trial be stayed until arbitration has been had in accordance with the terms of the agreements set forth in the petitioner's answer. Respondents' appeal to the Circuit Court followed (For their "Statement of Points" upon appeal, see R. 75).

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* The respective allegations of the complaint and answer with respect to respondent, John Sawczak, illustrate the differences as to overtime hours and regular hourly rates. Certain slight variations in dates have been disregarded.

Period	Employee's Claim Hours	Employee's Claim Rate	Employer's Claim Hours	Employer's Claim Rate
10/24/38 to 10/23/39	614	$.7379	468	$.7379
10/24/39 to 10/23/40	718	$.7379	570	$.60
10/24/40 to 5/ 1/41	424	$.7379	280	$.60
5/ 1/41 to 10/ 1/41	333	$.7932	296	$.6938
10/ 1/41 to 10/23/41	53	$.8116	896	$.71
10/23/41 to 11/30/42	892	$.8116		

The Circuit Court of Appeals, by a divided vote, concluded that the order of the District Court staying the action pending arbitration, was correct but modified the order by directing "that the proceedings in arbitration will be conducted under the rules of law as set out herein" (that is, in the opinion). Judge McAllister, dissenting in part, thought that the definition of "commerce" contained in Section 1 of the Arbitration Act which provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," extended to all provisions of the Arbitration Act, including Section 3, and forbade any stay thereunder applicable to any contract of employment.

Petitioner now seeks to review the action of the Circuit Court in modifying the District Court's order and directing that arbitration be conducted "under the rules of law" set out in the opinion. The substantial effect of the Circuit Court's opinion is to narrow the arbitration to a mere assessment of the overtime wages, if any, due respondents. This results from the fact that upon pleadings alone, without opportunity to petitioner for a plenary determination of facts either by the arbitrators or by the District Court and a jury, the Circuit Court has ruled that petitioner never actually paid or applied the agreed or "formula" hourly rates; as *obiter dictum*, that the formulas for determining hourly rates are insufficient under the Fair Labor Standards Act; and that the settlement contained in the Agreement of May 20, 1941 is ineffective for any purpose under the decision of this Court in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697.

REASONS FOR GRANTING WRIT

I. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(A) Petitioner has been denied its "day in court" by the Circuit Court's so-called "modification" of the District Court's order.

Is there an agreement in writing for arbitration? Is the issue involved in respondents' suit "referrable to arbitration" under such agreement? These were the sole questions presented by petitioner's application for a stay of the action pending arbitration pursuant to Section 3 of the Arbitration Act.

Both the District Court and the Circuit Court found there was a binding and enforceable agreement between the parties for arbitration "of any difficulty or disagreement * * * in any way growing out of the relations of the employers and employed * * *". Moreover, both courts determined that respondents' claims for unpaid wages, while grounded upon the Fair Labor Standards Act, are within the scope of this agreement for arbitration and constitute an arbitrable issue under Section 3 of the Arbitration Act. In so ruling, both courts followed the Circuit Court's earlier decision in *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3.*

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* While the arbitrability of an employee's claim for unpaid wages under Sections 6 and 7 of the Fair Labor Standards Act is of itself a novel question in this Court and one where conflict exists between the Third Circuit (*Donahue* case, *supra*) and the Sixth Circuit (*Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876), this petition does not directly present the question because its answer by the Third Circuit Court of Appeals in the present case was favorable to petitioner.

Another novel question raised by this record but not presented by this petition for the same reason is reflected in the differences between the majority court and Judge McAllister as to the interpretation and scope of Section 3 of the United States Arbitration Act.

The District Court stayed the trial of the action without qualification, pending arbitration of respondents' claims. The Circuit Court affirmed the stay order, with modifications, saying: "Our conclusion is that the matter should proceed to arbitration, but only in accordance with the rulings of law hereinafter set forth."

While ostensibly permitting the arbitration of respondents' claims to proceed in accordance with the agreement of the parties, the Circuit Court, in fact, has almost completely usurped the function of the arbitrators both as to issues of law and fact. Moreover, it has done so on the basis of the pleadings and a limited stipulation of facts without opportunity to petitioner at any time or in any forum to develop the full and relevant facts of the employment relationship with respondents.

The essential vice of this action by the Circuit Court readily appears upon analysis of the pleadings. Each respondent's claim for unpaid wages breaks down into three related sub-issues: (1) How many overtime hours did each respondent work? (2) What hourly rate of pay did each respondent receive in the successive periods of employment here involved?* (3) Did petitioner pay each respondent time and one-half his applicable regular hourly rate for all overtime hours during the successive employment periods in accordance with Section 7 of the Fair Labor Standards Act?

Of these three integrated subissues, only (1) relating to the question of overtime hours is left for arbitration under the Circuit Court's opinion and order. The other issues as to the operative hourly rates and petitioner's

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* The Circuit Court's opinion refers to three periods of employment: October 24, 1938 to November 1, 1939; November 1, 1939 to May 1, 1941; and May 1, 1941 to November 30, 1942, the terminal date of respondent's claims as pleaded.

payments, are determined by the Circuit Court on a record liberally characterized as "meager",* in such a way as to foreclose any consideration of them by the arbitrators.

The injustice of the Circuit Court's action is highlighted by further brief consideration of the nature of these sub-issues and their summary treatment by the Court.

For the first period of employment, October 24, 1938 to November 1, 1939, there is no dispute as to the applicable hourly rates. Moreover, petitioner concedes that currently during this period it did not pay respondents in accordance with Section 7 for any overtime actually worked (the exact number of overtime hours claimed by respondents is disputed in virtually every instance). But petitioner does claim that any liability that may have accrued to individual respondents for this period was paid by the Wage Agreement of May 20, 1941 (effective May 1, 1941) wherein employees of the class represented by respondents were given a wage increase or adjustment roughly equivalent to 10% of their previous weekly earnings (including overtime) for the duration of the new agreement (that is, to April 30, 1943) in "full settlement and satisfaction of all their claims, if any, for overtime against any signatory arising out of employment prior

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* This characterization is borrowed from the Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as *Amicus Curiae* (footnote 6, p. 7) filed in the Circuit Court. The Administrator's apprehension of this deficiency is further manifest from the following statement in his brief (footnote 14, p. 14):

> "If the evidence in the present record does not conclusively establish the artificiality and invalidity of the formula, at least it reveals the *necessity for further inquiry into the facts regarding its application and operation before it can be held valid.*" (Italics ours.)

to May 1, 1941". This settlement of liability paid, as it was, by installments over a two year period, represented a substantial sum in the case of each respondent.*

The Circuit Court summarily decided that this settlement was invalid under *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, on the speculative assumption that it was not "the result of a bona fide dispute with respect to coverage or amount", and, therefore, not within the area of the question reserved by that case.** But petitioner has never had its "day in court" to show the circumstances under which this settlement was reached with the United Mine Workers of America as collective bargaining agent for respondents!

Respondents in their answer to petitioner's application for a stay, did not specifically allege the invalidity of this settlement. Hence petitioner should not now be penalized for any failure to allege further facts showing the exist-

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* While the exact amount of the settlement in a given case cannot be computed on the basis of the meager and incomplete figures appearing in the record, a rough idea can be obtained from the following illustration:

Respondent X worked regularly 56 hours per week. During the period October 24, 1938 to November 1, 1939 he worked 12 hours overtime (the standard then being 44 hours per week, not 40 as now) for 50 weeks or approximately 600 overtime hours. Assuming X's regular hourly rate was $1.00 per hour, petitioner's liability under Section 7 of FLSA would be $300 for overtime plus an equal amount of liquidated damages, or a total of $600.

Before the agreement of May 20, 1941 became effective Employee X's regular weekly earnings (including overtime) were $56 per week. Under the settlement clause of the 1941 agreement, X received roughly 10% additional each week for two years in payment of the liability. Assuming he worked 100 full weeks during that period, he was paid $560 against the liability of $600 which included both overtime and liquidated damages.

** Presumably the question reserved in the *Brooklyn Savings Bank* case, will be explored by the Court in *D. A. Schulte, Inc.* v. *Gangi*, No. 517, certiorari granted Nov. 19, 1945.

ence of a bona fide dispute. Nor could petitioner anticipate this Court's decision in the *Brooklyn Savings Bank* case and foresee the relevance of such additional facts. And, in the last analysis, as the District Court held, the validity or invalidity of the settlement did not affect or alter the obligation of the arbitration agreement and was not a relevant issue in the proceedings for a stay under Section 3.

In any event, the pleadings show for this first period of employment, as well as for the subsequent periods, that there were and are substantial differences between the parties as to the hours of overtime actually worked. Moreover, while in its answer served in May, 1943, petitioner does not dispute coverage of the Act, it should not be precluded from showing that in May, 1941 when the settlement was effected, prior to *United States* v. *Darby*, 312 U. S. 100, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and other leading cases construing the Act (*e. g.*, *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572 and *Jewell Ridge Coal Corp.* v. *Local 6167*, 325 U. S. 161), substantial questions existed as to the validity of the Act, its application to these employees, and the effect of a collective bargaining agreement providing earnings far in excess of the Act's minimum requirements.

Further, petitioner has never had any opportunity to show the circumstances surrounding this settlement, that respondents received the approximate 10% wage increase for the two year period of the new wage agreement only as a settlement of alleged overtime claims under the Act and not because of "economic pressure by the bargaining agent" or "naturally on a rising wage scale market", as the Circuit Court gratuitously suggests might have been the case. The Circuit Court says "we do not know nor see how it could be demonstrated, how much of the increased wage scale was for payment of compensa-

tion due under the Act" and how much of it for other factors suggested by the Court. But the decisive fact remains that petitioner has never been given a chance to make the demonstration!

Even assuming the settlement is found eventually not to preclude respondents' claims under the Act for the period prior to May 1, 1941, because not within the area reserved by the *Brooklyn Savings Bank* case or because of some further limitation of that area by this Court in a subsequent case or cases, petitioner is entitled, at least, to show the amount of the additional sums paid in the settlement and to apply such sums as a set-off against the liability. While the Circuit Court's opinion is not clear on the question of a possible set-off (the question was not discussed in the District Court's opinion nor in the briefs of the parties either in the District Court or Circuit Court because it was suggested for the first time by the unusual treatment accorded the case in the Circuit Court), we read the opinion as foreclosing any such action by petitioner in the limited arbitration proceedings contemplated by the Circuit Court's opinion and order.*

With respect to the second and third periods of employment, petitioner has also been denied its "day in court". For both periods, November 1, 1939 to November 30, 1942, respondents' hourly rates were fixed pursuant to

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* The Circuit Court ended its discussion of the settlement as follows: "Our conclusion is that the terms of the new wage scale is not a settlement sufficient under the Act in the light of the Supreme Court decisions above cited." (The only case cited in this Court is *Brooklyn Savings Bank* v. *O'Neil*.) Whether or not a past liability under FLSA can be paid in whole or *in part* by the payment of higher wage rates and higher earnings than the employer would have paid in the absence of a settlement of the liability, is a novel question never determined by this Court nor, to the best of our knowledge, by any court other than the Third Circuit Court in this case. As such it is one of the questions presented by this petition.

formulae prescribed by the collective bargaining agreements and ratified by the parties.*

For this period following November 1, 1939, the pleadings raise issues not only as to the actual hours worked overtime, but also regarding the applicable hourly rates. Petitioner pleaded that the rates fixed by the formulae under the Wage Agreements of May 26, 1939 and May 20, 1941 were bona fide rates which actually governed the employment relationships between the parties. Concededly, if the rates established by the agreements were real rates, respondents were paid in accordance with Section 7 of the Act for all overtime hours. No question was raised by respondents either in the District Court or in the Circuit Court that petitioner had failed to comply with the agreements.

The fundamental issue for the period after November 1, 1939 then remained. Were the hourly rates fixed by the agreements real or fictitious?

This issue called for a careful examination of the relationship of the parties and inquiry, among other facts, as to whether the rates established by the formulae were translated to petitioner's payrolls, whether respondents knew the rates so established and whether petitioner actually calculated respondents' earnings on the basis of such agreed rates.

This issue—which petitioner believed it had the right to present to the arbitrators as triers of fact or, in any

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* While the Circuit Court's opinion treats the period November 1, 1939 to May 1, 1941 as distinct from the period after May 1, 1941, because the hourly rate formula was specifically set forth in the agreement covering the latter period, but only authorized by the prior agreement and the subsequent related resolution of the Board of Conciliation, petitioner's argument that it has been foreclosed from offering evidence to show the actual operative rates is the same for both periods.

event, if erring in its claim for arbitration, to the District Court and a jury—the Circuit Court seized upon and finally determined without opportunity to petitioner for presentation of its evidence.

The method and reasoning whereby the Circuit Court summarily decided this issue is rather transparent. The formula rates are held fictitious and, therefore, not lawful rates upon a finding that the formula rates were not in fact the rates paid; and this finding is based upon the stipulation with respect to the due bills, making that stipulation conclusive upon petitioner contrary to the intention of the parties as expressed in the stipulation.

All the opinion of the court except that section under the heading: "The Formula" is expressly based upon the due bills of Sawczak and Hohn. It is equally clear that the portion under "The Formula" rests upon this basis also. In the opinion it is said (R. 92):

> "But whether the regular rate was explicitly stated or had to be figured out as indicated, the essential test of its sufficiency was whether it was an actual regular rate or a fictitious one."

And later (R. 93) referring to the case of *Walling* v. *Helmerich & Payne,* 323 U. S. 37 (1944), it is further said:

> "There was thus an apparent compliance with the Act. But actually because of the figures at which the new regular rate was set, exactly the same wages as before were paid. This is precisely what has occurred under the formula of the instant case."

And finally (R. 95):

> "The evidence already marshalled is clearly indicative that the formulae were directed only to one goal, *i. e.,* to continue the old methods of payment for work while ostensibly meeting the requirements of the Act technically and technicalities are not enough."

The formulae are condemned because "conditioned upon maintaining actually and essentially the same *mode of payment* as before the Act" (R. 94) and "the same *payment practices* as hitherto" (R. 95).

The "evidence already marshalled" and "payment practices" can only refer to the due bills and inferences drawn from them, because there is no other evidence in the record on the subject. There is nothing in the formulae as such to indicate hourly rates established by them were not actual but fictitious.

"Nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously so long as the new rate equals or exceeds the minimum required by the Act." *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 630. A purport either expressed or implied to accomplish that end, which has been expressly held to be lawful, cannot be evidence that a rate so designed is fictitious.

It is apparent, therefore, that the conclusion that the hourly rates established by the formulae were fictitious rests upon the inferences drawn by the Circuit Court from the due bills.

The only purpose of the preliminary hearing under Section 3 of the Arbitration Act was to determine whether the tribunal for the determination of respondents' claims for unpaid wages under the Fair Labor Standards Act, and the three related subissues of overtime hours, hourly rates and payment, was the District Court or the Board of Conciliation as arbitrator. The stipulation on which the Circuit Court has acted as though it were final and binding, was clearly limited in extent and for a limited purpose. It did not purport to contain all of the facts relevant to the controversy or necessary for its decision,

nor did it contemplate a final decision upon the merits of any part of the case.*

The Circuit Court's modification of the order of the District Court has made a final determination that the settlement effected in the May, 1941 agreement is of no validity—even as a set-off against any liability proved by respondents—and that the hourly rates established by the formulae of the May, 1939 and May, 1941 agreements are fictitious. Petitioner's evidence with respect to these issues has not been heard and petitioner has been shut off from all opportunity for presenting such evidence at any future time.

If the Circuit Court had reversed the order of the District Court staying proceedings until arbitration had been had, the case must have been remanded to that court for trial upon the merits. In sustaining the order, a full hearing on the merits should likewise have been permitted before the Board of Conciliation.

II. The Circuit Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court.

(A) The Court below did not articulate its power under Section 3 or other provisions of the Arbitration Act to prejudge the issues of law and fact. Its power to do so clearly presents a novel question in this Court.

As a preliminary proposition, it is highly doubtful that Federal Courts have any power to interfere with arbitration proceedings to the extent of deciding arbitrable

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* It is apparent that the agreement was not intended to be final for all purposes of the case and that defendant had some explanation and evidence in respect to these due bills which it reserved the right to offer at a hearing on the merits of the case either in the District Court or before the Board of Conciliation, whichever should be held to be the proper forum for trial.

issues of fact and law. Arbitrators are, of course, bound to follow the law. But it has been held that an award may not be set aside for a mistake of fact or law. *James Richardson & Sons* v. *W. E. Hedger Transportation Corp.*, 98 F. 2d 55, cert. den. 305 U. S. 657; *Mutual Benefit Health & Accident Association* v. *United Casualty Co.*, 142 F. 2d 390, cert. den., 323 U. S. 729. If Federal Courts do not have this right *after* award, it would seem, *a fortiori*, they do not have the right to determine the facts and law *before* arbitration, as in this case. The only conceivable justification for such action might be the "private-public character" of the rights (see *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 709) asserted by respondents in this case, though we find no suggestion of any such distinction in the cases.

Secondly, if there is any justification for judicial interference in the actual arbitration proceedings contemplated by petitioner's application for a stay, the Federal Courts, at least, are seemingly without power in this case. On respondents' failure to submit their wage claims to arbitration by the Board of Conciliation in accordance with the collective bargaining agreements, petitioner could not affirmatively compel such submission pursuant to Section 4 of the Arbitration Act. Petitioner endeavored to obtain such an order but the District Court ruled against it (R. 71-72).

Jurisdiction to compel arbitration under Section 4 is apparently limited by Section 2 of the Arbitration Act to "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce", whereas power to grant a stay under Section 3, is not so confined, but extends to arbitration proceedings exclusively within the jurisdiction of the state courts. Cf. *Shanferoke Co.* v. *Westchester Co.*, 70 F. 2d 297, affirmed 293 U. S. 449. Thus, even if the right to supervise an arbitration on questions of fact or law is to be

derived from the power to order and compel arbitration, no such case is presented here.

Because of the apparent limiting effect of Section 2 on all provisions of the Arbitration Act except Section 3, it would also follow that if respondents voluntarily proceeded to arbitration of their claims against petitioner before the Board of Conciliation, summary proceedings to confirm, vacate or modify any award of the arbitrators pursuant to Sections 9, 10 and 11 of the Arbitration Act could not be maintained. In that event, such proceedings would seem to be cognizable only in the Pennsylvania courts under the equivalent provisions of the Pennsylvania Arbitration Act (1927, April 25, P. L. 381, No. 248, Sections 9, 10 and 11; 1 Purdon's Penna. Statutes Annotated, Sections 169, 170 and 171).

If a Federal Court acting under Section 3 and deriving its power from that section alone has any rights of supervision over the arbitration proceedings, it is confined to ascertaining that the applicant for the stay "is not in default in proceeding with such arbitration" (See opinion of Learned Hand, J. in *Shanferoke Co.* v. *Westchester Co.*, 70 F. 2d 297, at p. 299). The court in this case has far exceeded that limit.

(B) The third question presented by this petition has been discussed at some length in connection with the first question. It was there pointed out that the Circuit Court summarily decided that the settlement of liability contained in the agreement of May 20, 1941 is not effective, because there are no facts to show a bona fide dispute with respect to coverage or amount within the area reserved in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 703, 714. Petitioner claims substantial prejudice because foreclosed from showing the existence of such a dispute.

Moreover, rejecting the settlement as a complete bar to any prior liability under the Fair Labor Standards Act, the Circuit Court has also foreclosed even a partial set-off against such liability. Payment of higher future wages in consideration of a settlement can never be payment, *in whole or in part*, of a liability under the Act, seems to be the rationale. Perhaps the Circuit Court meant to say that it was not persuaded that the higher future wages were *in fact* payment, in whole or in part, of the liability in this case. If so, petitioner's grievance rests wholly within the first question presented.

The ruling is much broader and apparently precludes consideration of a set-off by petitioner as a matter of law. Indeed, it implies that any installment payment of a wage and hour liability linked to wages for some subsequent period of employment, is of no force and effect under the Act.

The question has never had the attention of this Court and should now be answered as one important in the administration of the Act.

Conclusion

It is respectfully submitted that this case presents a proper occasion for the exercise of the supervisory power of this Court.

THE HUDSON COAL COMPANY,
Petitioner.

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December 29, 1945.